ORIGINAL

IN THE HIGH COURT OF AUSTRALIA

THE COMMISSIONER FOR RAILWAYS

V.

SMALL

REASONS FOR JUDGMENT

18/-

Judgment delivered at SYDNEY

on WEDNESDAY, 10th AUGUST, 1955.

J. J Gourley, Govt. Print., Melb.

C.7163/51

THE COMMISSIONER FOR RAILWAYS

v.

SMALL

JUDGMENT (ORAL)

DIXON C.J.
McTIERNAN J.
WILLIAMS J.
WEBB J.
TAYLOR J.

THE COMMISSIONER FOR RAILWAYS

v.

SMALL

DIXON C.J. These are appeals by the Railway Commissioner as the defendant in two actions arising out of an accident which occurred as long ago as 1st March 1951. The accident resulted in the death of a man named Small and the actions are brought by his widow who is his executrix. It is not necessary to describe the causes of action more particularly than to say that one was under the Compensation of Relatives Act and the other was for damages for the destruction of a tractor.

Small was driving a tractor with a trailer northward along a somewhat winding path from a farm. The path led over an accommodation crossing upon the defendant's railway line near Kolodong. The railway line runs approximately east and west, but there is a curve just before the crossing on the western side. The road over the railway crossing is nothing but a track. On the northern side it leads to a gravel road. A light engine was proceeding from the west to the east along the line; that meant that it must travel round the curve which led to the crossing. The track from the farm/to the crossing went for some distance in an easterly direction and then turned north. From the place where it turned north a person travelling upon the track might have seen to his left, that is to the west, for some appreciable distance along the railway line until the curve shut out his view.

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As the deceased Small drove the Ferguson tractor across the railway line, the engine struck the trailer; the tractor itself was just over the line. Small was thrown into the air and was killed. Preceding him along the track was a neighbour, a man named Gill. He preceded him in a car and had

driven through the gates of the crossing which had been opened. Gill, after crossing the line, drove towards the gravel road, got out of the car and came back for the purpose of closing the gates after the tractor and trailer had crossed.

The actions were based, of course, on negligence and the defendant relied on the contributory negligence of Small. The negligence which the plaintiff sought to establish on the part of the defendant's servants included failure on the part of the train to whistle when coming round the curve as, according to the evidence, had been customary. It is not contested that it was open to the jury to find that negligence. The jury found a verdict for the plaintiff. What remains in question is the competence of the jury to negative contributory negligence on the part of Small, the deceased. It is said that Small's contributory negligence was conclusively shown on the plaintiff's own case and that the contributory negligence consisted in the failure of Small to look to his left. The evidence of contributory negligence depends in the main on Gill's evidence coupled with the circumstances of the case, though it is supported to some extent by the evidence of Small's son, a boy who saw the accident from a bank on which he was standing at a point some 100 yards west of the crossing.

I do not propose to discuss that evidence beyond saying that according to Gill he was walking towards the crossing facing Small as he drove the tractor across the crossing and that he did not see him look to the left or to the right. In his examination in chief he said he/Gill, was not paying much attention and in his cross-examination the answer was extracted from him that he did not see the/deceased look to the left or the right. Small's son who was watching the place from some distance away turned in the direction of his father but did not see him look.

There are three matters of fact on which the contributory negligence must turn. One is whether the deceased did in fact look; another is whether at a relevant stage if he / had looked he

must have seen the engine in time to avoid the collision, and the third is whether having regard to all the circumstances he was guilty of a lack of reasonable care if he failed so to look where he could see the engine approaching. The burden of proof in establishing contributory negligence is, of course, upon the defendant. The defendant must then satisfy the jury upon a balance of probability that contributory negligence occurred and, of course, that it was a material cause of the injury complained of by the plaintiff.

In the present case we think that it is not possible for the appellant to make out the contention that contributory negligence was conclusively established so that it was the duty of the jury to find for the defendant on that ground. To say that there is a strong case of contributory negligence is not to the point. In matters of this description, where the burden of proof is upon the defendant, it must appear to a Court, before the verdict can be set aside and a contrary verdict entered, that the jury could not do anything else but find in accordance with the defendant's contention. In the present case the jury might reasonably have qualified the evidence which I have mentioned and read it as not showing with sufficient definiteness that the deceased did not look at the material time. That is to say, the jury might reasonably have failed to be satisfied by the evidence that the deceased did not look at all at any material time up the line to his left. They might also, I think, have reasonably failed to be satisfied that if at points, where in their view it was his duty to look exercising reasonable care for his own safety, he had looked to his left he could have seen the engine in time to avert the accident. Further, it must be remembered, as the Full Court pointed out, that this is a case in which a car had gone over the crossing; his neighbour was walking down to shut the gates; the train coming in that direction was accustomed to whistle and it was a casual light engine not travelling along the line at a time when trains were to be expected. In all those circumstances it was open to the

jury to decline to find that the deceased exhibited a lack of reasonable care in failing to look for himself up the line.

For these reasons I think that the Court cannot say that it was the imperative duty of the jury to find contributory negligence. The appeals should be dismissed with costs.

McTIERNAN J.: I agree.

WILLIAMS J.: I agree.

WEBB J.: I agree.

TAYLOR J.: I agree.

DIXON C.J.: I should add that we would have granted special leave had we been of a contrary opinion but it does not seem necessary in the view we take.